

1
2
3
4 BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
5 STATE OF MONTANA

6 IN THE MATTER OF:

) Case No. 2003-53

7 THE PROPOSED DISCIPLINARY
8 TREATMENT OF BEN THIELEN,
9 doing business as
10 AA BAIL BONDS,

)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND ORDER

11 Respondents.

) AND NOTICE OF
) OPPORTUNITY FOR
) JUDICIAL REVIEW

12 INTRODUCTION

13 The Insurance Department of the State Auditor's Office (hereafter, DOI) issued a Notice
14 of Proposed Agency Action and Opportunity for Hearing to Ben Thielen d/b/a AA Bail Bonds
15 (hereafter, Notice) alleging that he used dishonest practices in the conduct of affairs under the
16 surety insurance producer license and that he failed to acknowledge and pay a claim in a
17 reasonably prompt manner. Respondent Ben Thielen requested a hearing to contest these
18 allegations.

19 RESPONDENT'S MOTION FOR PARTIAL DISMISSAL
20 AND MOTION IN LIMINE

21 Respondent Thielen moved for partial dismissal of the Notice, specifically, the alleged
22 violation of MCA § 33-17-1001(1)(f) (in the conduct of affairs under the license, used
23 fraudulent, coercive, or dishonest practices or the licensee or applicant is incompetent,
24 untrustworthy, financially irresponsible, or a source of injury and loss to the public). Thielen
25 asserted that the alleged violation was based on the Findings and Ruling After Administrative
26 Hearing, *In the matter of: Thielen, Ben d.b.a.: AA Bail bonds for Sun Surety Insurance Co.*,
27 issued by Anaconda/Deer Lodge County Justice of the Peace Kevin A. Hart on March 11, 2002,

1 (hereafter, Judge Hart's Order) and Judgement and Sentencing Order, *State of Montana v. Ben*
2 *Thielen, dba AA Bail Bonds*, issued by Anaconda/Deer Lodge County Justice of the Peace
3 Samuel E. Brown on June 12, 2002 (hereafter, Judge Brown's Order) finding Thielen in
4 contempt of court. Subsequently, Thielen entered an Agreement for Deferred Prosecution in the
5 district court for the criminal contempt. After successfully completing the terms of the deferred
6 prosecution, an order dismissing the charge of criminal contempt was issued.

7 Hearing Examiner Michael J. Rieley denied Thielen's motion for partial dismissal. The
8 Hearing Examiner concurred with the DOI that the administrative action was based on whether
9 Thielen provided false evidence and made misrepresentations to a Montana tribunal, and not the
10 consequences imposed upon Thielen by other tribunals.

11 On September 29, 2004, day of the hearing, Thielen made a motion in limine to exclude
12 two of the DOI's proposed exhibits: Judge Hart's Findings and Ruling After Administrative
13 Hearing, dated March 11, 2002, and Judge Brown's Judgement and Sentencing Order, dated June
14 17, 2002. At hearing, the Hearing Examiner admitted both Judge Hart's Order (Exhibit A) and
15 Judge Brown's Order (Exhibit D).

16 Both of Thielen's motions concern the admissibility and weight of Judge Hart's Order
17 and Judge Brown's Order and therefore will be addressed together.

18 The Commissioner finds that Judge Hart's Order and Judge Brown's Order are public
19 records. Rules 803(8) and 1005, M. R. Evid. In testimony before the Hearing Examiner, Judge
20 Hart and Judge Brown identified their respective orders and the authenticity of the same. (Hart
21 testimony, Tr. 44; Brown testimony, Tr. 191-193.) Additionally, the Hearing Examiner and
22 Commissioner have discretion to take judicial notice of law, including the records of any court of
23 this state. Rule 202, M. R. Evid.

24 Further, the Hearing Examiner and Commissioner have discretion to take judicial notice
25 of certain facts at any stage in the proceedings. Rule 201, M. R. Evid.; *In re K. C. H.*, 316 Mont.
26 13, 68 P.3d 788 (2003). To be judicially noticed, a fact must be one that is not subject to
27 reasonable dispute in that it is capable of accurate and ready determination by resort to sources
28

1 whose accuracy cannot be reasonably questioned. Rule 201(b)(2), M. R. Evid.; In re K. C. H.,
2 316 Mont. 13, 68 P.3d 788 (2003).

3 In In re K. C. H., the Supreme Court found that the district court could, in proceedings to
4 terminate a father's parental rights, take judicial notice of the mother's prior parental rights
5 termination proceeding involving three other children even though the court records in the prior
6 proceeding were sealed. 316 Mont. at 16, 68 P.2d at 791. The father argued that since the record
7 of the prior proceeding was sealed, the court took judicial notice of facts that were not known to
8 him. In re K. C. H., 316 Mont. at 15, 68 P.2d at 790. The Supreme Court held that the father
9 was undoubtedly aware of the prior termination proceeding (the petitions to terminate the father's
10 parental rights included a "Report to the Court" detailing the Department of Public Health and
11 Human Service's interaction with the mother over several years including the removal of the
12 other children and her relinquishment of parental rights). In re K. C. H., 316 Mont. at 15-16, 68
13 P.2d at 790-91. Further, the father could have petitioned the court for access to the records but
14 did not. In re K. C. H., 316 Mont. at 15-16, 68 P.2d at 790-91.

15 In the present case, Thielen was certainly aware of Judge Hart's Order and Judge Brown's
16 Order and the factual determinations made in those Orders. Judge Hart and Judge Brown made
17 the findings in each of these Orders after conducting separate hearings at which Thielen was
18 present, represented by counsel, and testified. (Thielen testimony, Tr. 279-280 and Tr. 284.)
19 Judge Hart found, after a hearing during which sworn and unsworn testimony was received, that
20 Thielen made a misrepresentation to the court in revoking Bradley Gagner's bail bond. (Hart
21 testimony, Tr. 76-84; Exhibit A.)

22 Judge Brown independently found that Thielen provided false statements and evidence to
23 revoke Gagner's bond. Judge Brown did not see Judge Hart's Order prior to holding a hearing
24 and Judge Hart did not participate in the hearing. (Brown testimony, Tr. 195-196; 190-191.) In
25 the hearing, Judge Brown heard sworn testimony from several witnesses, including Bill Woods
26 and Thielen (Tr. 189-190), and found that Thielen provided false statements and evidence to
27 revoke Gagner's bond. (Exhibit D; Exhibit 1.)

1 Further, the Deferred Prosecution Agreement signed by Thielen references and
2 summarizes these Orders in stating that Judge Hart's Order found that Thielen misinformed the
3 court and that Judge Brown's Order found that Thielen provided false statements to the court.
4 (Exhibit 1.) The findings that Thielen made a misrepresentation to the court in revoking
5 Gagner's bond are not subject to reasonable dispute and the Commissioner may take judicial
6 notice of the same. See Rule 201, M. R. Evid.; In re K. C. H., 316 Mont. 13, 68 P.3d 788 (2003).
7 (Exhibit A, Exhibit D, and Exhibit 1.)

8 Thielen asserts that Rule 803(8)(iv), M. R. Evid., excluding factual findings resulting
9 from a special investigation of a particular complaint, case or incident, applies to exclude Judge
10 Hart's Order and Judge Brown's Order. (Exhibits A and D.) The Commissioner finds that Rule
11 803(8)(iv), M. R. Evid., is inapplicable and does not require the exclusion of Judge Hart's Order
12 or Judge Brown's Order. The Compiler's Comments to Rule 803(8), M. R. Evid., state:

13 This exception is not the same as Federal Rule 803(8), but is identical to Uniform
14 Rule (1974) 803(8). The Commission chose to adopt the Uniform provision
15 because it was clearer than the Federal Rule and because it expressed better policy
with certain reports in requiring the official to testify rather than admitting his
report as a hearsay exception.

16 In applying Rule 803(8)(iv), the Montana Supreme Court has held that the factual findings in
17 investigative reports prepared by a state agency may be excluded from evidence. Crockett v. City
18 of Billings, 234 Mont. 87, 761 P.2d 813 (1988); Mahan v. Farmers Union Central Exchange
19 Inc., 235 Mont. 410, 768 P.2d 850 (1989). In Crockett, the Supreme Court held that the district
20 court should have excluded a Montana Human Rights Commission (HRC) compliance officer's
21 findings, made after an investigation, that there was reasonable cause to believe that Crockett had
22 been discriminated against. 234 Mont. 97, 761 P.2d at 820. The Supreme Court noted that
23 although findings by the Equal Employment Opportunity Commission (EEOC) have been found
24 to be admissible under Rule 803(8), F. R. Evid., the findings of the HRC, in the form of the
25 reasonable cause determination, were not admissible pursuant to Rule 803(8)(iv), M. R. Evid., in
26 that it was an investigative report of a particular discrimination complaint. Crockett, 234 Mont.
27 97-98, 761 P.2d at 820.

1 Applied to the present case, Rule 803(8)(iv), M. R. Evid., would operate to exclude the
2 findings in the investigative report prepared by DOI investigator John Forsman. However, the
3 investigative report was not offered or admitted into evidence. Instead, the justice court orders
4 were admitted. Applying Theilen's reading of Rule 803(8), M. R. Evid., broadly, the factual
5 findings in all court orders would be inadmissible hearsay because every judicial proceeding can
6 be characterized as a special investigation of a particular complaint, case or incident.

7 HEARING

8 Pursuant to mailed notice, a contested case hearing was conducted by Hearing Examiner
9 Michael J. Rieley on September 29 and 30, 2004. The hearing was conducted pursuant to the
10 hearings and appeals provisions of the Montana Insurance Code (§§ 33-1-701, *et seq.*, MCA); the
11 contested case provisions of the Montana Administrative Procedure Act (§§ 2-4-601, *et seq.*,
12 MCA); and Montana's statutory, public participation in governmental operations notice and
13 hearing provisions (§§ 2-3-101, *et seq.*, MCA).

14 At the contested case hearing, Roberta Cross Guns represented the Insurance Department
15 (DOI). Frank J. Joseph, Esq. represented the Respondent, Ben Thielen (Thielen).

16 Testimony was presented on behalf of the DOI from its insurance investigator, John
17 Forsman; former Anaconda-Deer Lodge Justice of the Peace and Butte City Judge, Kevin Hart
18 (Hart); Helena City Judge Myron Pitch (Pitch); Granite County Justice of the Peace, Sam Brown
19 (Brown). Jim Hosking, father of Darin Hosking (Hosking); David Vicevich, Esq. (Vicevich);
20 Ben Thielen (Thielen); Bill Woods (Woods); and Ralph Raiha (Raiha) provided testimony on
21 behalf of Thielen.

22 The following documents were offered and received into evidence on behalf of DOI:
23 March 11, 2002, "Findings and Ruling After Administrative Hearing" issued by Anaconda/Deer
24 Lodge County Justice of the Peace Kevin A. Hart *In the matter of: Thielen, Ben d.b.a.: AA Bail*
25 *bonds for Sun Surety Insurance Co.* [8 pages] (DOI's Exhibit A); July 25, 2002, letter from
26 Helena City Court Judge Myron E. Pitch to Thielen with attached Sun Surety appearance bond
27 no. 5-34685 and Power of Attorney no. 5-34685 [3 pages] (DOI's Exhibit B); June 12, 2003,

1 letter from Helena City Court Judge Myron E. Pitch to Shirley at the DOI with attached January
2 29, 2002, "Notice of Bond Forfeiture" in *City of Helena v. Darin Lawson Hosking* Case No.
3 2001-TR-005411 [2 pages] (DOI's Exhibit C); and June 12, 2002, "Judgement and Sentencing
4 Order" issued by Anaconda/Deer Lodge County Justice of the Peace Samuel E. Brown in *State of*
5 *Montana v. Ben Thielen, dba AA Bail Bonds* [1 page] (DOI's Exhibit D).

6 The following documents were offered and received into evidence on behalf of Thielen:
7 April 4, 2002, letter from Anaconda/Deer Lodge County Justice of the Peace Kevin A. Hart to
8 David Vicevich [1 page] (Respondent's Exhibit 20); November 13, 2003, letter from Helena City
9 Court Judge Myron E. Pitch to Carol Roy at the DOI [1 page] (Respondent's Exhibit 14); front
10 and back copy of April 5, 2002, check no. 0879 drawn on Glacier Bank by James R. Hosking
11 payable to the "City Court of Helena or AA Bail Bonds" in the amount of \$1,020.00 and
12 endorsed by AA Bail Bonds Ben Thielen [1 page] (Respondent's Exhibit 8); undated and
13 nonnotarized "The affidavit of James R. Hosking" [1 page] (Respondent's Exhibit 9); March 28,
14 2002, letter from David L. Vicevich to Justice of the Peace, Kevin A. Hart [1 page]
15 (Respondent's Exhibit 19); October 26, 2002, "Agreement for Deferred Prosecution" in Montana
16 Third Judicial District Court Cause No. DV-02-134 *State of Montana vs. Ben Thielen* [3 pages]
17 (Respondent's Exhibit 1); July 29, 2004, "Order" of Judge Mizner in Montana Third Judicial
18 District Court Cause No. DV-02-134 *State of Montana vs. Ben Thielen* (Respondent's Exhibit
19 30); December 11, 2003, "To Whom It May Concern" letter from Benedict J. Thielen [2 pages]
20 (Respondent's Exhibit 25); carbon copy of July 5, 2002, check no. 2375 drawn on Glacier Bank
21 account of Anne M. Thielen and Ben J. Thielen payable to the "Helena City Court" in the
22 amount of \$1,020.00 with notation stating "Pd in Full Darin Hosking Bond" [original]
23 (Respondent's Exhibit 29); March 11, 2002, "Order of Forfeiture and Notice of Nonappearance"
24 issued by Justice of the Peace Kevin A. Hart to Sun Surety Insurance Co. regarding Jean Marie
25 Bolt-Barela [1 page] (Respondent's Exhibit 16); March 19, 2002, letter from David L. Vicevich
26 to Justice of the Peace Kevin A. Hart, with statute attachment [2 pages] (Respondent's Exhibit
27 17); and March 28, 2002, "Order" issued by Justice of the Peace Kevin A. Hart in
28

Anaconda/Deer Lodge County Cause No. 00-20138 *State of Montana v. Bolt-Barela, Jean Marie*
[1 page] (Respondent's Exhibit 18).

DOI's Exhibit A and Respondent's Exhibit 25 were admitted over objection of counsel.
All other exhibits were admitted without objection.

**HEARING EXAMINER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
AND EXCEPTIONS FILED BY THE PARTIES**

The Hearing Examiner issued Proposed Findings of Fact, Conclusions of Law, and Order on February 28, 2005, and served counsel for the DOI and for Respondent Thielen by mail. Respondent Thielen filed exceptions to the Hearing Examiner's proposed decision and requested oral argument. Counsel for DOI filed a response that the Hearing Examiner's proposed decision should be adopted.

On May 24, 2005, State Auditor and Commissioner of Insurance John M. Morrison conducted a hearing regarding the Hearing Examiner's proposed decision and Respondent Thielen's exceptions. Subsequently, Commissioner Morrison issued a Scheduling Order for Supplemental Exceptions and Briefs allowing Respondent Thielen to obtain a transcript prepared by a court reporter of the September 29 and 30, 2004, hearing before Hearing Examiner Rieley and then file supplemental exceptions based on any new material in the court reporter's transcript.¹

Respondent Thielen obtained a transcript and provided copies to counsel for DOI and the Commissioner. Subsequently, Respondent Thielen filed supplement exceptions and counsel for the DOI filed a response. Any real or perceived prejudice to Thielen from not having a court reporter's transcript of the hearing for use in preparing his proposed findings of fact, conclusions of law and order and his first exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law, and Order has now been remedied.

¹Previously, counsel for Respondent Thielen requested and received copies of the tape recordings of the hearing before Hearing Examiner Rieley and made a transcript which Thielen used in drafting and supporting his exceptions.

1 Respondent Thielen also alleges prejudice in that Hearing Examiner Rieley did not have
2 the court reporter's transcript when he prepared the Hearing Examiner's Proposed Findings of
3 Fact, Conclusions of Law, and Order. Under the Montana Administrative Procedure Act,
4 Sections 2-4-601 *et seq.*, MCA, a transcript of an administrative hearing is only prepared when
5 requested by a party and paid for by that party. § 2-4-614, MCA. Accordingly, transcripts are
6 not always prepared and, if not prepared, obviously are not included in the record of the
7 proceedings. § 2-4-614, MCA. Failing to have a court reporter's transcript does not invalidate
8 the hearing examiner's proposed decision or the final agency decision in the matter. See Sections
9 2-4-614 and 2-4-621, MCA.

10 Respondent Thielen also alleges that he was prejudiced by the lapse of time between the
11 September 29 and 30, 2004, hearing and the issuing of the Hearing Examiner's Proposed
12 Findings of Fact, Conclusions of Law, and Order on February 28, 2005. The Commissioner
13 finds that this lapse of time was not unreasonably long and did not violate due process or
14 otherwise prejudice Thielen. See Klundert v. Board of Personnel Appeals, 219 Mont. 347, 712
15 P.2d 776 (1986) (a 37 month delay between the filing of the grievance and the hearing before the
16 Board was not too long and did not violate due process); Connell v. Dept. of Social and
17 Rehabilitative Services, 280 Mont. 491, 930 P.2d 88 (1997) (failure of a hearing examiner to
18 render a decision nearly four years after the hearing was too long and violated due process).

19 On October 4, 2005, Commissioner Morrison conducted a hearing regarding the Hearing
20 Examiner's proposed decision and Respondent Thielen's exceptions and supplemental
21 exceptions. Counsel for Respondent Thielen and for the DOI were present and argued.

22 STANDARD OF REVIEW

23 In reviewing the Hearing Examiner's proposed decision, the Commissioner is guided by
24 the Montana Administrative Procedure Act (MAPA) regarding contested cases. § 2-4-621,
25 MCA. Section 2-4-621(3), MCA, of MAPA provides:

26 The agency may adopt the proposal for decision as the agency's final order. The
27 agency in its final order may reject or modify the conclusions of law and
28 interpretation of administrative rules in the proposal for decision but may not

1 reject or modify the findings of fact unless the agency first determines from a
2 review of the complete record and states with particularity in the order that the
3 findings of fact were not based upon competent substantial evidence or that the
4 proceedings on which the findings were based did not comply with the essential
5 requirements of law. The agency may accept or reduce the recommended penalty
6 in a proposal for decision but may not increase it without a review of the complete
7 record.

8
9 As noted in Ulrich v. Board of Funeral Service, 289 Mont. 407, 412, 961 P.2d 126, 129 (1998):

10 “When conducting a review of the Board’s decision, we note that the Board,
11 which did not personally hear or observe the evidence, does not have the authority
12 to conduct a *de novo* review of the hearing examiner’s decision. Rather, it may
13 reject the examiner’s findings only if they are not based upon competent,
14 substantial evidence. Additionally, the Board must state with particularity that the
15 findings are not based upon competent, substantial evidence. . .” [omitting partial
16 quote of §2-4-621, Mont. Code Ann.]

17 “A rejection of the hearing examiner’s findings in violation of §2-4-621(3) MCA,
18 constitutes an abuse of discretion pursuant to §2-4-704(2)(a)(vi). [omitting
19 citation]”

20 In interpreting MAPA, however, the Montana Supreme Court has held that a hearing
21 examiner’s findings of fact may be modified or rejected in other circumstances. See In the
22 Matter of the Grievance of Brady, 295 Mont. 75, 983 P.2d 292 (1998). The Commissioner may
23 determine that certain of the Hearing Examiner’s findings of fact have no substantive value in
24 determining the legal issues in this matter and therefore the Commissioner may reject those
25 findings as immaterial. See Brady, 295 Mont. at 79-80, 983 P.2d at 295.

26 With regard to the Hearing Examiner’s conclusions of law interpreting and applying the
27 Montana Insurance Code, Sections 33-1-101 *et seq.*, MCA, and rules promulgated thereunder,
28 the Commissioner may determine that the Hearing Examiner misinterpreted these and may
29 modify or reject the same. See Brady, 295 Mont. at 83, 983 P.2d at 297; Steer. Inc. v.
30 Department of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). Further, the
31 Commissioner may accept or reduce the recommended penalty in the Hearing Examiner’s
32 proposed decision but may not increase it without a review of the complete record. § 2-4-621(3),
33 MCA.

1 After due consideration of the complete record, including the testimony offered at the
2 September 29 and 30, 2004 hearing² and the documentary evidence, the Commissioner hereby
3 issues the following:

4 **FINDINGS OF FACT**

5 1. Ben Thielen (Thielen) holds a surety insurance producer license issued by the
6 Montana State Auditor's Office, and was an insurance producer during the times in question,
7 under the d/b/a of AA Bail Bonds. (Forsman testimony, Tr. 19.) Thielen has been an insurance
8 producer since June, 1997. (Thielen testimony, Tr. 253.)

9 2. John Forsman (Forsman), an insurance investigator for the Department of Insurance
10 (DOI), testified that he was contacted by former Justice of the Peace and City Judge for
11 Anaconda-Deer Lodge, Kevin Hart (Hart) regarding Thielen. (Forsman testimony, Tr. 17-19.)
12 Forsman testified that the gist of Hart's complaint was that Thielen revoked a bond for Bradley
13 Gagner (Gagner) because the premium had not been paid. (Forsman testimony, Tr. 18.)³

14 3. Hart forwarded to Forsman documents regarding an administrative hearing held
15 by Hart who concluded this was the actual reason for the bond revocation, and not that a cosigner
16 had removed his name from the bond, because (i) the cosigner didn't have his name on the bond
17 at the time, and (ii) the bond was extended when Thielen received a premium payment.
18 (Forsman testimony, Tr. 20.)⁴

19 4. In early February 2002, Thielen wrote a \$10,000.00 bail bond for Gagner to be
20

21 ²In his proposed decision, Hearing Examiner Rieley cited to a transcript of the September 29 and
22 30, 2004 hearing prepared by Respondent Thielen and included as an exhibit to Respondent's Exceptions
23 and Objections to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Order.
Subsequently, a transcript was prepared by a court reporter and the citations in these Findings of Fact,
Conclusions of Law, and Order are to the court reporter's transcript.

24 ³Respondent Thielen filed an exception to the Hearing Examiner's Proposed Finding of Fact #2.
25 Upon reviewing the complete record, the Commissioner determined the challenged portion was
26 immaterial to determining the legal issues in this matter and revised Finding of Fact #2 to remove it. See
Brady, 295 Mont. at 79-80, 983 P.2d at 295. Additionally, Finding of Fact #2 and #3 were rewritten for
clarity.

27 ⁴See Footnote #3.
28

1 released from jail in Anaconda. (Thielen testimony, Tr. 254-55.) Gagner had been arrested
2 for a criminal violation. (Forsman testimony, Tr. 18-19; Thielen testimony, Tr. 254;
3 Woods testimony, Tr. 316-17.) Gagner's mother, Barbara Cole was a cosigner for the bond
4 via an indemnity agreement. (Thielen testimony, Tr. 257.) Billy Woods gave Thielen an
5 oral promise, i.e. "his word" to also sign a cosigner agreement. (Thielen testimony, Tr.
6 257; Woods testimony, Tr. 299 and 316.) Thielen wrote the bond even though only
7 \$800.00 of the \$1,020.00 had been paid at the time. (Thielen testimony, Tr. 256-57.)

8 5. Thereafter, on or about February 20, 2002, Woods telephonically informed
9 Thielen that he was no longer willing to co-sign regarding Gagner's bail bond. (Thielen
10 testimony, Tr. 261; Woods testimony, Tr. 300-301, 305, and 322.) Two days later Thielen
11 revoked the bond and apprehended Gagner and turned him over to the Anaconda police.
12 (Thielen testimony, Tr. 272.)

13 6. On or about February 25, 2004, Thielen reinstated the bond (Woods testimony,
14 Tr. 309-10.) because Woods (re)agreed to "place his name on the indemnity agreement, and
15 they would pay the \$220.00 to get" Gagner "out of jail." (Thielen testimony, Tr. 273.)
16 After Woods again agreed to co-sign the indemnity agreement, and Thielen received more
17 money toward the bond fee from Gagner (Thielen testimony, Tr. 273; Woods testimony, Tr.
18 317-319) Woods did sign the agreement at a gas station in Butte after Gagner was retrieved
19 from jail (Woods testimony, Tr. 309-10 and 324).

20 7. Thielen testified to having agreed to post the bond despite the partial premium
21 payment because he knew Woods as a man who honored his word, and agreed to vouch for
22 his friend Gagner and promised to later sign the indemnity agreement as a cosigner with
23 Mrs. Cole. (Thielen testimony, Tr. 257-58.)

24 8. Thielen testified to not feeling secure with Mrs. Cole, as the sole guarantor of
25 the appearance bond contract, because she was approximately 75 to 80 years old, physically
26 disabled, and her only known source of income or assets were her Social Security Benefits
27 which were unattachable in the event a lawsuit to recover the \$10,000.00 bond became
28

1 necessary. (Thielen testimony, Tr. 273.)

2 9. Hart testified to conducting an administrative hearing on March 1, 2002,
3 regarding Gagner's bond revocation, i.e. whether the revocation had occurred as
4 represented to County law enforcement by Thielen (that "Cosigner removed name from
5 contract") or because a \$220.00 balance remained unpaid to the bondsman, Thielen. (Hart
6 testimony, Tr. 42-43; Exhibit A.) "It was an administrative hearing to determine if in fact
7 the purposes for Mr. Thielen surrendering Mr. Gagner to law enforcement was factual, true
8 to reason that was taking place." (Hart testimony, Tr. 92.) From that hearing, during which
9 sworn and/or opinion testimony was received and Thielen was represented by legal counsel,
10 Hart concluded that Thielen revoked the bond because of the unpaid balance which did not
11 constitute good cause for such revocation. (Hart testimony, Tr. 76-84; Exhibit A.) Hart's
12 reason for his conclusion appears to be based on the fact that the co-signer, Woods was not
13 a co-signer at the time Thielen revoked Gagner's bond, nor on the hearing date. (Hart
14 testimony, Tr. 93-94; Exhibit A.) The March 1st hearing occurred after Woods changed his
15 mind a second time and verbally (re)agreed to co-sign regarding Gagner's bond. (Exhibit
16 A.)⁵

17 10. Although at first Woods testified before Hearing Examiner Rieley that he
18 signed the indemnity agreement after the March 1, 2002, administrative hearing (Woods
19 testimony, Tr. 309), Woods then contradicted his own and Hart's testimony by testifying
20 that he did in fact testify at the March 1, 2002, hearing before Hart that he had signed the
21 indemnity agreement prior to that hearing when Thielen reinstated the bond. (Woods
22
23

24 ⁵Respondent Thielen filed exceptions to the Hearing Examiner's Proposed Finding of Fact #9, #10, #11,
25 and #12. After reviewing the complete record, the Commissioner finds that there is competent substantial evidence
26 to support the Hearing Examiner's Proposed Findings of Fact #9, #10, #11, and #12. The Commissioner concurs
27 with Hearing Examiner Rieley that Woods contradicted his testimony on this issue while Judge Hart's testimony did
28 not vary in any significant way from his Findings and Ruling After Administrative Hearing dated March 11, 2002.
The Commissioner further concurs with Hearing Examiner Rieley, who presided over the hearing and was able to
observe the witnesses, that Judge Hart is a more reliable, credible witness than Woods. Accordingly, the
Commissioner finds that the Hearing Examiner's Proposed Findings of Fact #9, #10, #11, and #12 are well-founded
and adopts the same but with some modifications for clarity.

1 testimony, Tr. 311.)⁶

2 11. Woods again contradicted Hart's testimony by recalling that he testified at
3 Hart's hearing that there were household and other items packed into boxes at Gagner's
4 home (Woods testimony, Tr. 308-309), whereas Hart testified that Wood's testimony at the
5 March 1, 2002, hearing was that the packed boxes were filled with children's clothing only.
6 (Hart testimony, Tr. 119.)⁷

7 12. Woods testified to having memory problems and dealing with alcohol issues
8 "back then and things like that." (Woods testimony, Tr. 314 and 322.) By comparison,
9 Hart was a public official who made an administrative record of what occurred at the
10 March 1, 2002, hearing within 10 days of that hearing and whose testimony before Hearing
11 Examiner Rieley was not demonstrated to vary in any significant way from his March 11,
12 2002, administrative rendition. The Commissioner concurs with Hearing Examiner Rieley
13 that Hart offered the more reliable testimony in the present matter regarding what actual
14 testimony transpired at the March, 2002, hearing.⁸

15 13. Judge Hart, believing that Thielen may have committed contempt, referred the
16 matter to another judge for determination. (Hart testimony, Tr. 82.) On June 5, 2002,
17 Judge Brown conducted a hearing in which he heard sworn testimony from several
18 witnesses, including Woods and Thielen. (Brown testimony, Tr. 188-190; Exhibit D.)
19 Judge Brown also found that Thielen provided false statements and evidence to revoke
20 Gagner's bond and issued an Order on June 12, 2002. (Brown testimony, Tr. 191-193;
21 Exhibit D; Exhibit 1.)⁹

22
23 ⁶See Footnote #5.

24 ⁷See Footnote #5.

25 ⁸See Footnote #5.

26 ⁹Upon reviewing the complete record and taking judicial notice of Brown's Order and the facts
27 contained therein, the Commissioner modified the Findings of Fact to include this Finding of Fact #13
28 and renumbered the remaining Findings of Fact. Also see the foregoing discussion concerning judicial
notice of law and facts in the section regarding Respondent's Motion for Partial Dismissal and Motion in

1 14. On June 16, 2003, Forsman received another referral regarding Thielen. This
2 referral came from Helena City Judge, Myron Pitch (Pitch) regarding nonpayment by
3 Thielen of a bond forfeiture. (Forsman testimony, Tr. 21.) The allegations were that
4 Thielen bonded out Darin Hosking and when Hosking did not come to court the bond
5 forfeiture was not paid. (Forsman testimony, Tr. 21; Exhibit B.)

6 15. Judge Pitch testified to ordering a bond forfeited on January 29, 2002, because
7 Thielen said he had the bonded defendant, Hosking in custody. (Pitch testimony, Tr. 155.)
8 Thielen never brought Hosking to court, so Thielen was notified by mail that 90 days had
9 passed, and the \$1,020.00 forfeiture was due. When Thielen didn't pay, the information
10 went to DOI. (Pitch testimony, Tr. 155; Exhibit B.) Judge Pitch's Court has never received
11 payment for the bond forfeiture. (Pitch testimony, Tr. 161-62 and 180; Exhibit C.)

12 16. Jim Hosking of Anaconda, testified to giving Thielen a check dated April 5,
13 2002, payable to "City Court of Helena or AA Bail Bonds" in the amount of \$1,020.00, as a
14 bond forfeiture payment for the bail bond guarantee he signed on behalf of his stepson,
15 Darin Hosking. (Hosking testimony, Tr. 138-140, 144-149; Exhibit 8.) Thielen obtained
16 the check from Jim at his home in Anaconda, instead of getting Darin. (Hosking testimony,
17 Tr. 140.) This check was endorsed by "AA Bail Bonds Ben Thielen" and deposited into his
18 account on April 5, 2002. (Hosking testimony, Tr. 139; Thielen testimony, Tr. 356-57;
19 Exhibit 8.) At the time Thielen didn't tell Jim Hosking that he was not going to pay the
20 Court, but at a later time did tell him that "he did put it into his account." (Hosking
21 testimony, Tr. 141-142 and 147.) At this later time, it was Hosking's "understanding" from
22 what Thielen told him that the Judge didn't want Darin, and wanted money from Thielen
23 and not Hosking. (Hosking testimony, Tr. 142-43.) At this same time, Thielen told
24 Hosking that "if the Court deemed that it [the money] wasn't supposed to come from"
25 Hosking, Thielen would refund the money. (Hosking testimony, Tr. 143.)

26 17. Thielen testified to his belief that Judge Pitch's telephonic order telling him to
27 _____

28 Limine.

1 release Darin Hosking and pay the bond to satisfy Hosking's contempt fines was not legal.
2 (Thielen testimony, Tr. 356.) Thielen testified to wanting to investigate the legality of the
3 judge's instructions, and therefore, was not going to immediately pay the amount to the
4 Court. (Thielen testimony, Tr. 356 and 407.) Thielen testified to advising Jim Hosking of
5 this at the time the Hosking check was written, but Hosking testified that he was told of this
6 "later on." (Thielen testimony, Tr. 407; Hosking testimony, Tr. 142.)

7 18. Thielen testified to seeking input from other courts of limited jurisdiction, the
8 Auditor's office, and other attorneys to help determine the legality of Judge Pitch's
9 instruction. (Thielen testimony, Tr. 407.) Thielen further testified to speaking "with
10 several attorneys and judges in Butte" who affirmed the illegality. (Thielen testimony, Tr.
11 407.) This investigation led Thielen "to believe what Judge Pitch had done was illegal."
12 (Thielen testimony, Tr. 407-408.)

13 19. Subsequently, in July of 2002, Thielen testified to writing a July 5, 2002, check
14 from his personal account payable to Helena City Court in the amount of \$1,020.00 with a
15 notation thereon stating "Pd in Full Darin Hosking Bond." (Thielen testimony, Tr. 359;
16 Exhibit 29.) Thielen testified to mailing the check "right thereafter" (Thielen testimony, Tr.
17 358) following a telephone call in late June, early July of 2002, because of being
18 "threatened" by the Court. (Thielen testimony, Tr. 408 and 410.) Thielen explained this
19 threat as being advised that he was treading on thin ice and was required to make the
20 payment in order to remain in good standing with Judge Pitch's Court. (Thielen testimony,
21 Tr. 408-410.)

22 20. Thielen never tried to explain to or advise Judge Pitch of his legal disagreement
23 with Judge Pitch's Order, nor ask for a hearing. (Thielen testimony, Tr. 408-410.)

24 21. Thielen testified that after mailing his payment to Judge Pitch's Court, he
25 received a second demand letter on or about July 25, 2002. (Thielen testimony, Tr. 361;
26 Exhibit B.) Thielen testified to telephonically advising the Helena City Court that he had
27 mailed the payment, and that the clerk said that the notice and payment may have crossed in
28

1 the mail or perhaps the money was received but had not yet been recorded and credited.

2 (Thielen testimony, Tr. 361-62.)

3 22. The next time Thielen was aware of any dispute or problem concerning the
4 payment of the Hosking bond was approximately 1½ years later when he received a letter
5 dated November 19, 2003 from the DOI. (Thielen testimony, Tr. 362; Exhibit #14.)

6 Thielen provided a written response dated December 11, 2003, and stating in part:

7 The other bond was paid in full by the co-signor, Mr. Jim Hosking in the
8 amount of \$1020.00 in March of 2002; once again well within my 90 day
9 time limit. That matter seems yet to be resolved, even though Mr. Hosking
10 paid that bond in full. Judge Pitch sent another letter in July of 2002 stating
that they did not receive payment on the Hosking's forfeiture when it was
paid in full by Mr. Jim Hosking, in March of 2002. A copy of that canceled
check will follow promptly.

11 (Thielen testimony, Tr. 292-295 and 362; Exhibit 25.)

12 23. Although paid by Hosking for the forfeiture, Thielen has not in fact paid the
13 Helena City Court in that the forfeiture check Thielen sent to the Helena City Court was not
14 received (Pitch testimony, Tr. 161-62 and 179-80) and Thielen testified that the check
15 never cleared his bank account. (Thielen testimony, Tr. 411.) Thielen took no action to
16 find out what happened to his check with which he testified to paying Judge Pitch's court
17 and made an assumption "that Judge Pitch was holding the check." (Thielen testimony, Tr.
18 409-10.) Thielen testified, "I just figured that no news was good news. I wasn't being
19 threatened by Judge Pitch's court anymore." (Thielen testimony, Tr. 410.) Thielen never
20 thought any more about it; "The money is still there, it is not like I have absconded with the
21 funds." (Thielen testimony, Tr. 411.)

22 From the foregoing Findings of Fact, the Commissioner makes the following:

23 CONCLUSIONS OF LAW

24 1. According to § 2-15-1903, MCA, the State Auditor is the Commissioner of
25 Insurance (Commissioner).

26 2. The Montana Department of Insurance is under the control and supervision of
27 the Commissioner. Sections 2-15-1902 and 33-1-301, MCA.

1 3. The Commissioner has jurisdiction over this matter pursuant to § 33-1-311,
2 MCA. Section 33-1-311, MCA, requires the Commissioner to enforce the applicable
3 provisions of the insurance laws of this state. Under § 33-1-311(3), MCA, the
4 Commissioner has a duty to “ensure that the interests of consumers are protected” and
5 under § 33-1-311(2), MCA, has authority as may be reasonably implied by the Insurance
6 Code provisions. Under § 33-1-311(4), MCA, the Commissioner has the additional duty of
7 conducting investigations and examinations of insurance matters to determine whether any
8 person has violated any provisions of the laws of this state.

9 4. Pursuant to § 33-1-102(1), MCA, a person or entity may not transact a business
10 of insurance in Montana or a business relative to a subject resident, located, or to be
11 performed in Montana without complying with the Montana Insurance Code. Sections 33-
12 1-101, *et seq.*, MCA.

13 5. Thielen violated § 33-17-1001(1)(f), MCA, by using dishonest practices in his
14 affairs under his producer’s license when he provided false evidence to former Judge Hart’s
15 court regarding Thielen’s revocation of Gagner’s bail bond.¹⁰

16 6. Thielen violated § 33-17-1001(1)(f), MCA, by failing to payover to the Helena
17 City Court of Judge Pitch money regarding the Darin Hosking bailbond matter, a business
18

19
20 ¹⁰Respondent Thielen filed an exception to the Hearing Examiner’s Proposed Conclusion of Law
21 #5 alleging that it was not supported by reliable, probative and substantial evidence. Upon reviewing the
22 complete record, the Commissioner finds that this Conclusion of Law is supported by competent
23 substantial evidence. See § 2-4-621(3), MCA. Further, the Hearing Examiner has correctly interpreted
24 and properly applied the Montana Insurance Code, Sections 33-1-101, *et seq.*, MCA, to the facts.
25 Accordingly, the Commissioner adopts the Hearing Examiner’s Proposed Finding of Fact #5.

26 Respondent Thielen filed exceptions to the Hearing Examiner’s Proposed Conclusions of Law #6
27 and #8 regarding violations of Sections 33-18-201(2), (3) and (6), MCA. The Commissioner finds that
28 unfair claim settlement practices in violation of § 33-18-201, MCA, must constitute a “general business
practice” before the Commissioner may impose an administrative penalty. Rule 6.6.1701, ARM,
provides that a general business practice means multiple unfair claim settlement practice violations by
the same company or person in different cases. Since it has not been established that Thielen failed to
investigate, acknowledge and pay claims other than the Hosking bond, the Commissioner does not find
that such was Thielen’s general business practice. Accordingly, the Commissioner finds that the Hearing
Examiner misinterpreted the statute and therefore has rejected the Hearing Examiner’s Proposed
Conclusions of Law #6 and #8 and renumbered the remaining Conclusions of Law.

1 affair conducted under his Montana insurance producer's license, and by failing to seek a
2 hearing on the matter.¹¹

3 7. Thielen violated § 33-17-1001(1)(d), MCA, by improperly withholding the
4 money received from Jim Hosking, and thereby passively converting to his own use this
5 sum of money.¹²

6 8. Thielen is in violation of § 33-17-1001(1)(c), MCA, by violating the specific
7 provisions of the Montana Insurance Code identified above.¹³

8 9. The evidence underlying the findings, in particular the lack of diligence in
9 pursuing with the Court resolution of the Hosking matter, as well as the false written
10 statement made to the Court regarding the reason for Gagner's bond revocation, indicates
11 that license disciplinary action is appropriate.¹⁴

12 From the foregoing Findings of Fact and Conclusions of Law, the Commissioner

13
14 ¹¹Respondent Thielen filed an exception to the Hearing Examiner's Proposed Conclusion of Law
15 #7, renumbered here as Conclusion of Law #6. Upon reviewing the complete record, the Commissioner
16 finds that this Conclusion of Law is supported by competent substantial evidence. See § 2-4-621(3),
17 MCA. Further, the Hearing Examiner has correctly interpreted and properly applied the Montana
Insurance Code, Sections 33-1-101, *et seq.*, MCA, to the facts. The Commissioner also noted that
Thielen did not request a hearing on the Hosking bond forfeiture, but otherwise adopts the Hearing
Examiner's Proposed Conclusion of Law #5.

18 ¹²Respondent Thielen filed an exception to the Hearing Examiner's Proposed Conclusion of Law
19 #9, renumbered here as Conclusion of Law #7. Upon reviewing the complete record, the Commissioner
20 finds that this Conclusion of Law is supported by competent substantial evidence. See § 2-4-621(3),
21 MCA. The pleadings are amended to conform to evidence at hearing. Rule 15(b), M. R. Civ. P. Further,
the Hearing Examiner has correctly interpreted and properly applied the Montana Insurance Code,
Sections 33-1-101, *et seq.*, MCA, to the facts. Accordingly, the Commission adopts this Conclusion of
Law.

22 ¹³Respondent Thielen filed an exception to the Hearing Examiner's Proposed Conclusion of Law
23 #10, renumbered here as Conclusion of Law #8. Upon reviewing the complete record, the Commissioner
24 finds that this Conclusion of Law is supported by competent substantial evidence. See § 2-4-621(3),
25 MCA. Further, the Hearing Examiner has correctly interpreted and properly applied the Montana
Insurance Code, Sections 33-1-101, *et seq.*, MCA, to the facts established in the hearing. Accordingly,
the Commissioner adopts this Conclusion of Law.

26 ¹⁴The Commissioner revised the Hearing Examiner's Proposed Conclusion of Law #11,
27 renumbered here as Conclusion of Law #9, to reflect the Commissioner's determination that license
28 disciplinary action is appropriate, but that the Commissioner will reduce the penalty proposed by the
Hearing Examiner. See § 6-4-621(3), MCA.

1 makes the following:

2 ORDER

3 In accordance with Sections 33-1-317 and 33-17-1001, MCA, Ben Thielen is
4 hereby fined the sum of \$5,000.00, with all but \$1,000.00 suspended, provided that: he pay
5 the Helena City Court the \$1,020.00 forfeited bond in the Darin Hosking matter and
6 provide satisfactory evidence to the Commissioner that the Helena City Court has received
7 the money, such as a receipt from the Court; and he complies with the Montana Insurance
8 Code, Sections 33-1-101 *et seq.*, MCA, and all administrative rules for the 12 months
9 following the signing of this Order.

10 The administrative fine and the evidence of payment of the forfeited bond to the
11 Helena City Court must be received by the Commissioner within 30 days following the
12 signing of this Order. If the Commissioner does not receive satisfactory evidence within
13 the 30 days following the signing of this Order, the entire \$5,000.00 administrative fine is
14 due immediately. After paying the forfeited bond and providing evidence of the payment to
15 the Commissioner, however, Thielen may request a hearing before the Helena City Court or
16 other appropriate tribunal to contest whether the forfeited bond was properly paid to the
17 Court.

18 Whether Thielen failed to comply with any provisions of the Montana Insurance
19 Code or the administrative rules within the 12 months following the signing of this Order
20 will be determined in a subsequent legal (administrative, civil or criminal) proceeding by
21 the Commissioner, Department, and/or State of Montana which need not be concluded
22 within the 12 months following the signing of this Order. The remaining \$4,000.00 of the
23 administrative fine will be due within 30 days following the determination of Thielen's
24 failure to comply. In addition to the remaining \$4,000.00 administrative fine, the
25 Commissioner may impose any and all other sanctions available under Montana law for
26 Thielen's failure to comply including, but not limited to, license revocation.

27 \\\n

NOTICE

Respondent Thielen is hereby notified that he has the right to request judicial review of this Order by filing a petition for judicial review within 30 days of service of this Order with the district court in Lewis and Clark County, Montana, as provided in Sections 2-4-702 and 33-1-711, MCA.

DATED this 28 day of November, 2005.

State Auditor and Commissioner of Insurance

JOHN M. MORRISON

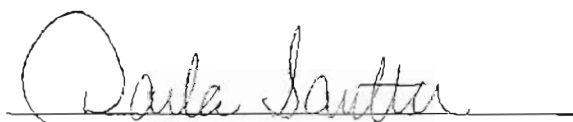
1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 28 day of November, 2005, I served a true and
3 accurate copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND
4 ORDER AND NOTICE OF OPPORTUNITY FOR JUDICIAL REVIEW upon the
5 legal counsel for the Respondent by certified mail, # 7005 0340 0002 7651 5530 at
6 the following addresses:

7
8 Frank J. Joseph
9 Joseph, Vicevich & Whelan
10 2801 S. Montana
Butte, MT 59701
(Legal Counsel for Respondent)

11
12 And upon counsel for the Insurance Department by hand delivery at the following address:

13
14 Roberta Cross Guns
Insurance Department
15 State Auditor's Office
840 Helena Avenue
16 Helena, MT 59601

17 
18
19
20
21
22
23
24
25
26
27
28